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Nos. 04-1528, 04-1530 and 04-1697

IN THE
Supreme Court of the United States

NEIL RANDALL, *et al.*, *Petitioners*,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*

VERMONT REPUBLICAN STATE COMMITTEE, *et al.*,
Petitioners,
v.
WILLIAM H. SORRELL, *et al.*, *Respondents*.

WILLIAM H. SORRELL, *et al.*, and VERMONT PUBLIC INTEREST RESEARCH GROUP, *et al.*, *Cross-Petitioners*,
v.
NEIL RANDALL, *et al.*, and VERMONT REPUBLICAN STATE COMMITTEE, *et al.*, *Cross-Respondents*.

On writ of certiorari to the United States Court of Appeals for the Second Circuit

Brief of Amicus Curiae ReclaimDemocracy.Org In Support of Respondents

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INTEREST OF AMICUS CURIAE

ReclaimDemocracy.org is a 501(c)(3) organization with a national membership that includes Vermont residents.[1] The organization works to build a genuinely representative democracy based on the principle that citizens' ability to influence elections and government should result from the quality of their ideas and their energy and effectiveness in promoting them, independent of their financial status.

ReclaimDemocracy.org works to ensure we do not decay from a democratic republic to plutocracy. In its view, the constitutional promise of equal protection of the laws for all citizens requires we separate the opportunity to influence elections from wealth. Moreover, it maintains that the wealth discrimination of the current system results in de facto race and (to a lesser extent) gender discrimination, so "purging wealth discrimination from the electoral system is ... a civil rights issue." ReclaimDemocracy.org's work would be severely undermined were this Court to determine that the First Amendment bars states from protecting their citizens and the democratic process itself by limiting the influence of wealth on elections.

ReclaimDemocracy.org asks the Court to affirm the right of the citizens of Vermont and their legislature to place reasonable limits on campaign investments and spending in order to further the purposes of the equal protection mandate of the Fourteenth Amendment.

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[1] Letters of consent have been filed with the Clerk of the Court. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amici curiae* and their members or their counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Vermont statute at issue in this case regulates monetary contributions to political campaigns and the amount candidates spend in order to assure Vermont's elections reflect the will of its citizens and the persuasiveness of candidates rather than the influence of domestic and foreign wealth.

Were it not for *Buckley v. Valeo*, 424 U.S. 1 (1976), Vermont's action would raise no substantial Constitutional issue. *Buckley*, however, equated money with speech and thereby introduced First Amendment principles of governmental abstention into campaign finance jurisprudence. By this misclassification, *Buckley* revived laissez-faire doctrines barring the government from protecting its citizens from the power of wealth. Its *Lochner*esque imposition of "the Social Statics of Mr. Herbert Spencer," see, *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting), creates an appearance of Constitutional conflict that has no basis.

Campaign contributions often are economic, marketplace transactions—purchases by individuals and business interests of "access" or "influence." Moreover, regardless of motivation, campaign contributions and candidate expenditures alike resemble economic activity far more than speech. Legislatures should be free to regulate them in order to protect our republican system of government from domination by wealth, just as they are free to create the rules for all other market transactions in order to harness the power of the market for the public good. *U.S. v. Carolene Products*, 304 U.S. 144, 153 (1938).[2] Free speech anti-

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[2] "Regulatory legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis ... ." Id.

censorship principles which preserve individual liberty against overreaching power have precisely the opposite effect when extended to create special privileges for the wealthy to dominate the electoral system.

All democracies must separate the realms of two different decision-making processes. First, a political arena of equal citizenship and political democracy, characterized by the fundamental principle of one person, one vote, *Reynolds v. Sims*, 377 U.S. 533 (1964). Second, a market arena of individual decision and regulation by price, where the anti-discrimination principle of equal access to markets co-exists with necessarily unequal wealth and economic power. Indeed, the separation of the spheres of market and law is basic to the rule of law itself: Both the Fourteenth Amendment and fundamental principles of justice dating back at least to Leviticus 19:15 teach that the law should favor neither rich nor poor.[3]

In our dual system, we allow money to buy most things, but never the political system that determines the limits to what money can buy. See, e.g., *Gordon v. Lance*, 403 U.S. 1, fn 1 (1971) ("a percentage reduction of an individual's voting power in proportion to the amount of property he owned would be similarly defective").

Vermont's statute limiting the influence of money on elections is an attempt to embody these basic norms in its electoral system in order to prevent democracy from degenerating into plutocracy. It seeks to protect the autonomy of the citizenry of Vermont and to ensure equal access to the electoral process, regardless of wealth, that has long been fundamental to this Court's jurisprudence. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly

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[3] Cf. Exodus 23:6, Deuteronomy 1:17, 16:9.

prohibiting the free exercise of the franchise"); *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (holding poll tax unconstitutional).

Moreover, like *Harper* itself, the Vermont statute recognizes that the wealth distribution in our country reflects racial divisions, so serious attempts to remedy racial wrongs also must confront the power of wealth. Each of these goals is presumptively valid under our Constitutional regime of republican democracy, and the legislature's choice of means is entitled to the usual deference granted to legislatively-enacted law.

Constitutional consideration of Vermont's attempt to protect its electoral system is distorted, however, by the lingering effects of *Buckley*. Neither Free Speech values, Equal Protection principles, nor the requirements of Due Process require that Vermont ignore the problems created for democracy when private wealth dominates the public electoral system.

The Court should take this opportunity to remedy the damage *Buckley* did to First Amendment, federalism and democratic values by rejecting this flawed precedent. Money is not speech. Applying doctrines designed to protect dissent and democracy to campaign finance has the perverse consequences of entrenching incumbents, unfairly enhancing the power of those individuals and corporations with the assets to purchase access to politicians, and, consequently, diminishing public faith in our institutions of government.

The Court should clarify that objections to the particular way Vermont has chosen to protect its republican form of government should be addressed to the people of Vermont and their elected representatives, not to this Court. Courts "are not free ... to reject [legislative] views about 'what constitutes wise economic or social policy,'" *Lyng v. UAW*, 485 U.S. 360 (1988).

ARGUMENT

I. *Buckley v. Valeo*'s Classification of Campaign Expenditures as First Amendment Speech Was Erroneous and Should Be Overruled

Buckley v. Valeo, 424 U.S. 1 (1976) revolutionized First Amendment and campaign finance law alike by holding that political money is "speech" for purposes of the First Amendment. Later cases have assumed the same analysis applies as against the state legislatures, via the Fourteenth Amendment's protections against violations of equal protection and due process of the laws.

But money is not speech. A regulatory regime appropriate to speech has perverse results when applied to money. After three decades of experience, the time has come to reexamine and reject *Buckley*.

First Amendment jurisprudence usually contains a strong presumption against governmental regulation, stemming from its core meaning as a ban on governmental censorship and governmental enforcement of religious and secular catechisms. *Buckley* transformed the traditional bar against censorship into something radically different: restrictive scrutiny of legislative action meant to protect the citizenry from abuse of the rights of property.

The First Amendment's protection against censorship is a critical element of our American system of republican self-government. First, the political freedom to criticize the incumbent officials is critical to majority rule: without it, government would be too free to manipulate, rather than respond to, public opinion. Open political debate is as foundational to democratic rule as elections. Second, we have long recognized free intellectual debate, cacophonous as it often is, as the only route to avoid the stagnation of vested

interests and to encourage intellectual progress. Third, the freedom to speak on all matters, even the purely artistic, creates a realm of privacy and personal freedom in which individuals can act without concern for the opinion of the majority, thus ensuring democracy does not degenerate into a tyranny of the majority.

Buckley, however, by simplistically substituting money for speech, promoted none of these values. Purchased speech often does not enhance political self-determination, truth-seeking intellectual inquiry or personal freedom.

A. *Buckley*, like *Lochner*, has privileged the privileged by sanctifying the current distribution of wealth

Buckley's equation of political money with speech repeats the infamous error of *Lochner*. In each case, the Court purported to derive an abstract principle from the Constitution's language. It then applied it without regard to context to cut off political debate over the difficult and controversial issue of how a democratic republic should manage its economy.

Lochner's invasion of the legislative sphere stemmed directly from its basic failing. The case assumed contractual agreements between bakers and their employers reflected the autonomous will of equal bargainers, and thus legislative imposition of terms was an invasion of the rights of both parties. This was a controversial view of contract then and remains one now. Others believed the very fact that bakers were willing to agree to work long hours in unsafe conditions was sufficient evidence that they had insufficient power to function as the autonomous beings the *Lochner* court imagined. *Lochner* was substantively wrong, first and foremost, because, by assuming equality when there was none, it further empowered the powerful at the expense of the weak. "Neutrally" enforcing agreements between bullies and their victims only worsens the position of the victims.

The *Buckley* framework suffers from a similar blindness to the realities of the world and a similar invasion of the legislative sphere with similar results: Reverse Robin Hood, it takes from the common person and gives to the rich. *Buckley* imposed a *Lochner*esque "free" market view on campaign regulation, in effect telling the people they and their elected representatives may not attempt to remedy the damage done to fair political competition by the distorting power of wealth. Like *Lochner*, *Buckley* wrongly interpreted the Constitution to protect a particular understanding of the rights of property, but not to protect more important rights—the true values of the First Amendment—from being subordinated to economic power.

Buckley mimicked *Lochner* in a third way. It made a major contribution to a political/economic complex that simply does not work on the ground, regardless of whether its particular conceptualization of the law can be made internally consistent. *Buckley* underpins the corruption and collapse of American politics much as *Lochner* helped lead to the collapse of our economy. The Great Depression demonstrated for many Americans that a market economy can succeed only if it involves and benefits a wide spectrum of citizens. *Buckley*'s imposition of *Lochner*esque "free markets" on elections has, similarly, led to the exclusion of most Americans from participation in and the benefits of democratic politics. This damages the legitimacy of and destabilizes our republican form of government. We should not wait for a political equivalent to the Great Depression before reversing course.

B. Property rights and the limits placed on the use of wealth to buy influence are matters of state law, not the First Amendment

The question of how best to define the rights of property and finance elections so as to protect citizens'

political rights and republican self-government is difficult and controversial. Many Americans today believe our representative democracy needs urgent repair. Campaign finance reform lies at the controversial core of that struggle precisely because it reflects multiple conflicting constitutional values.

Elections rely on the principles of "one person, one vote" and equal access to the ballot for their legitimacy. Similarly, the American conception of a republican form of government by "we the people" demands all citizens enjoy the equal protection of the laws and equal political rights regardless of wealth. See, e.g., *Harper*, 383 U.S. 663 (1966) (invalidating poll tax); *Bullock v. Carter*, 405 U.S. 134, 135 (1972) (invalidating ballot-access fees); *Lubin v. Panish*, 415 U.S. 709 (1974) (invalidating ballot-access fee). The rights and responsibilities of citizenship, like the law and its protection, cannot be for sale.

Our market-based economy has inherent tendencies to inequality and to expanding the range of items that can be bought and sold. Determining and maintaining the boundary between the realms of market and politics is a central political question in our society. How much should the legal system counterbalance market tendencies to give more to those who already have more? When should the legal system modify the rules creating the market system to price goods—such as security, social stability, or clean air—that other market-based legal rules might not? What things or rights ought not to be for sale at all?

Campaign finance reform is at the core of the great debate over the proper place of the market in a democratic republic. Under our Constitutional system, government cannot be for sale, nor can politics be reduced to a marketplace. But even equal access to the ballot "does not necessarily require that all who participate in the political marketplace do so with exactly equal resources." *McConnell*

v. Federal Election Comm'n, 540 U.S. 93, 227 (2003). Instead, these are issues for legislative determination.

Advertising works, and more advertising than the competition generally works better. Otherwise, campaign finance would be of little interest. Of course, well-financed candidates sometimes lose, just as fine advertising campaigns cannot always make up for poor products. The Edsel has its political analogues. In general, however, participants in our campaign system assume voters, like consumers, often can be influenced or persuaded to act as marketers wish. Thus modern campaigns are about buying votes, even when *quid pro quo* bribery is not in the picture.

Because money matters, the equal protection principles of our republic are challenged deeply by any system allowing unfettered use of private resources to influence public political campaigns. Equal citizenship becomes meaningless when donors, not voters, become politicians' major constituents or when candidates can run for office only if backed by institutional or individual wealth.

The *Buckley* framework fails because it does not recognize, let alone confront, the central issues of campaign finance reform. The First Amendment bars censorship, both to preserve the freedom of citizens to dissent from the majority and to preserve the integrity of our political system by preventing any incumbent government from molding the citizenry into its supporters. But ours is a government of the people, not of the dollars. Our politicians should be responsive to citizens' opinions backed by their voting power, not to their wealth backed by their purchasing power.

Contrary to the implication of *Buckley*, our First Amendment nowhere states that wealth has a Constitutional claim to buy governmental access and influence. Instead, *Buckley*, like *Lochner*, simply imposed a discredited interpretation of "free markets" on an unwilling nation.

Freeing wealth does not free citizens. Ordinary citizens are not freer if wealthy individuals and institutions can dominate the public discourse or obtain privileged access to the corridors of power. On the contrary, the democratic system is deeply distorted. The distortion is only worsened by the fact that much of our wealth is corporate owned, controlled by fiduciaries who are required by state law and market pressure to use it for only limited purposes without regard to any citizen's view of the public good.

In the end, *Buckley*, like *Lochner*, failed because the complex and often fact-dependent issues of appropriate economic regulation cannot be resolved intelligently based on interpretation of abstract notions of free markets imposed by the Court on our Constitution. A First Amendment seeking "to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982), requires the rules of electoral competition be structured to open politics to all citizens. Instead, *Buckley* reduces most citizens' participation to choosing from a menu predetermined by those who hold the real power in elections today—organized interests comprised of large donors.

C. Speech and political regimes are radically different from market and economic regimes

Our collective decisions result largely from two radically different processes: politics and economics. Our politics are founded in a basic concept of equal citizenship, enshrined in the guarantees of the Fifth Amendment and Fourteenth Amendment of due process and equal protection and vindicated by this court in its voting rights cases. Most political decisions are made by the people's elected representatives, subject to limitations on the scope of collective decision-making designed to preserve a sphere of

private freedom.

The religion, speech and press clauses of our First Amendment protect both this sphere of personal autonomy and the democratic process by a common core principle: No censorship and no mind control. American concepts of freedom bar our government from coercing the citizenry to agree with or support the current powers-that-be, whether political or religious.

Freedom of speech is, in its core, a negative right—a bar on governmental action that, by its nature, lends itself to absolutes. This is particularly true in light of the Court's role in protecting the system and procedures of democracy even when temporary crises may make governmental officials, or even the population as a whole, think it expedient to sacrifice them in the name of security, stability or other important values.[4] As Jefferson put it, in condemning the Alien & Sedition Acts: "[L]ibels, falsehood, and defamation, equally with heresy and false religion, are withheld from the cognizance of federal tribunals."[5]

Economic decision-making is dramatically different

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[4] See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952); *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). As the Court said in *Virginia v. Black*, 538 U.S. 343 (2003): "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." Thus, the First Amendment "ordinarily" denies a State "the power to prohibit dissemination of social, economic and political doctrine which a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374, (1927) (Brandeis, J., concurring) (some internal citations omitted).

[5] 4 J. ELLIOT'S DEBATES ON THE FEDERAL CONSTITUTION 541 (1876), quoted in *Columbia Broadcasting System, Inc. v. Democratic Nat. Committee*, 412 U.S. 94, 157 (1973) (Douglas, J concurring).

from political decisions. Most importantly, economic decisions are made on the radically different basis of purchasing power. Additionally, collective economic decisions are made, at least in the first instance, by the market's aggregation of many individual decisions, with none of the collective debate, voting or reasoned principles that characterize political, bureaucratic and legal governmental decisions. As a result, under the right circumstances, market decision-making can be both more conducive to individual choice and more likely to lead to economic growth.

The line between democratic and market decision-making, however, must be drawn by the democratic process. Votes, not wealth, must remain the ultimate source of legitimacy in a democracy. Ours is a republic of people, not dollars, based on equality of citizenship, not equality of dollars.

Since at least the Great Depression we have recognized that one of the great tasks of government is to define the rules and limits of markets to ensure the "invisible hand" of the markets work for the good of all. The meaning of the "good of all," and the necessary compromises that must be made between sometimes-conflicting goals of economic growth, security, equality, decency and stability are often the central issues of politics. No constitution, and certainly not ours, which predates the modern economy, can remove such issues from ongoing political debate. The First Amendment model of governmental inaction is simply inapplicable.

D. Money can buy speech, but it is never speech itself

Citizenship is equal, but wealth is not. Indeed, the distribution of wealth in our society is extraordinarily unequal, with 1% of the population controlling approximately 40% of the total financial wealth of the

country in 2001, while half the population controls only 1% of the wealth.[6] If money is allowed to unduly influence votes, democracy descends into plutocracy.

The ability to speak and persuade is not, of course, equal and could not be in any decent society. But that inequality is limited by the range of human abilities. The inequality of audience is, in the ordinary marketplace of ideas, related to the persuasiveness of the speaker's ideas.

Purchased advertising is different. A candidate with sufficient funds can buy talent he or she lacks, buy attention that the candidate's ideas or eloquence would not command on their own merits, and multiply his or her presence beyond the possibilities of merely human abilities.

E. In its interpretation of the First Amendment, *Buckley* reverted to the discredited notion that the Constitution mandates laissez-faire economic policies

After the Great Depression and the demise of *Lochner*, Americans rejected the notion that government should, or even can, stand apart from economic affairs. Market-based capitalism requires an elaborate infrastructure of property, contract, anti-trust, anti-fraud, environmental protection and civil rights law, all of which are subject to the ordinary ebb and flow of political debate and legal change. Acknowledging this reality, the Court belatedly acknowledged it had exceeded the bounds of its legitimacy in preventing the political branches from debating the preeminent issue of democratic politics in a market economy. The New Deal "switch-in-time" acknowledged the issue of

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[6] Edward N. Wolff, *Working Paper No. 407: Changes in Household Wealth in the 1980s and 1990s in the U.S.* (2004) at 7 and Table 2. Financial wealth excludes owner-occupied housing and pension wealth and is therefore a reasonable proxy for wealth available for political purposes. Id. at 4. Income is less unequally distributed than wealth, but even so, the top 1% of families control about 20% of all income. Id. at 8.

how to structure the rules of property and market cannot be constitutionally ordained for all time—in part because property exists only within a constantly changing regulatory regime. Instead, the proper structuring of property rights is—legitimately—the subject of hard-fought political battles and necessarily temporary victories to be reexamined with changes in the economy and political mores.

Buckley's interpretation of the First Amendment to generally preclude explicit regulation of campaign-related economic activity—the direct and indirect purchase of advertising and similar media access—worked an inappropriate revival of *Lochner*. Constitutional principles require respect for the political process, see *Carolene Products*, 304 U.S. at fn. 4, just as they require respect for property rights. They do not require the State of Vermont to privilege further the already privileged by allowing the wealthy to purchase political access or influence not affordable to the rest of us. Nor do they sanctify property rules created for other purposes when they conflict with the needs of self-government.

No democracy can long survive if access to power can be bought. In an era in which special interests represented by K Street lobbyists are widely viewed as having influence on the national legislative process far beyond their voting strength, *Buckley* stands as a practical and ideological obstacle to this republic's self-preservation and self-definition.

II. Constitutional Bars on Campaign Finance Reform Do Not Promote First Amendment Values

"The First Amendment is a rule of substantive protection, not an artifice of categories." *Alexander v. U.S.*, 509 U.S. 544, 565 (1993) (Kennedy, J. dissenting). Vermont's law is not censorship and does not run afoul of

either of the two most important First Amendment values.

First, so long as campaign finance reform does not discriminate based on viewpoint or other improper bases, it does not restrict the sphere of privacy in which citizens may worship, study, think, write and express themselves as they see fit without legal requirement to consider the views of the majority or the last electoral victors.

Second, limitations on the amounts candidates may raise or spend do not, unless taken to an extreme, threaten the free political discourse which underpins any democratic or republican government. On the contrary, by freeing politicians from the necessity to adapt every statement to the needs of potential donors, expenditure limits allow politicians to debate more openly the good of the country or the desires of the marginal voter.

It is a matter of legislative judgment whether a political debate is more likely to be effectively held (1) under procedural campaign finance rules that ensure fair opportunities for all participants in a manner analogous to Robert's Rules of Order; (2) in a free-for-all governed primarily by property rules created for different contexts and the particular distribution of wealth and access to private means of publicity they create; or (3) by some other set of rules altogether. The First Amendment mandates government neutrality as to content and a governmental commitment to open debate, but not any particular form or style of debate. *Thomas v. Chicago Park District*, 534 U.S. 316, 322 (2002) (upholding "time, place and manner" restrictions).

Many reformers believe that, ideally, a democratic society committed to equal citizenship and active political debate would provide open fora in which debate could take place—for example, by federal mandate that licensees of the public airwaves provide broadcast time to candidates without

charge. Others prefer to have candidates purchase broadcast access on the same terms as commercial advertisers, with or without state funding and with varying degrees of control over private funding. Still others, undoubtedly, believe preserving the power of the market is the most important value to be vindicated in setting campaign finance rules.

These debates, however, belong in our legislative branches because they are debates about how most effectively to govern, not about the meaning of the Constitution. The details of campaign finance reform require legislative judgments which should be left to legislatures except in extreme circumstances. The primary role for the Court is not to police restrictions on monetary expenditures under the guise that they are "speech." Instead, it should act to bar extreme legislative schemes that might violate the basic democratic values of *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 337 U.S. 533 (1964), such as when a legislative scheme racially discriminates, or is designed to favor certain parties or incumbents to such an extent as to "unconstitutionally den[y a group] its chance to effectively influence the political process." *Davis v. Bandemer*, 478 U.S. 109, 132 (1986); cf., *Mobile v. Bolden*, 466 U.S. 55 (1980) (upholding multi-member districting scheme even against claim that at-large voting without proportional representation discriminates against minorities).

A. Unlimited campaign expenditures violate Fourteenth Amendment principles of political equality

Buckley conflicts with equality principles as well as democratic republican ones. The First Amendment applies to the State of Vermont only by virtue of the Fourteenth Amendment's promise of "due process" and "equal protection of the laws" to every citizen. Yet *Buckley* perpetuated precisely the opposite of political equality: an unfair, racially biased system in which political equality is

subordinated to the dramatic inequality of wealth in America.

The distribution of wealth in America is increasingly skewed.[7] Moreover, the small minority controlling the bulk of our wealth does not reflect the racial and ethnic diversity of our country. *Id.* Any policy which, like *Buckley*, protects and increases the privileges of wealth also, necessarily, slows the process of setting historic discrimination behind us.

Under the peculiar regime of *Buckley*, wealthy individuals and institutions (whether or not citizens) have a constitutionally protected interest in using their wealth to distort the equality principle in American elections. This is backwards. The Fourteenth Amendment's promise of political equality ought, instead, to mean states have the authority to restrain the rights of wealth to purchase ever-expanding power.

Although the Fourteenth Amendment bars our state governments from creating classes of citizens, *Buckley* requires states to provide extraordinary justification for measures designed to level the political playing field and provide equal access to the electoral machinery to all citizens. Rather than promoting equal protection of the laws, *Buckley* further privileged the already privileged.

B. Unrestrained campaign spending may tend to entrench incumbents, contrary to the First Amendment goal of encouraging self-government

The self-determination goal of the First Amendment is meant to protect our ability to control incumbent legislatures. *Buckley*, however, fostered an incumbent protection regime by limiting the extent to which legislatures can regulate political money.

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[7] See, e.g., EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA (1996).

Vermont could reasonably conclude that incumbents can raise money more easily than challengers because incumbents have more influence to sell to economically-driven donors who see contributions as profit-maximizing purchases of access to the regulatory regime.

1. Advertising displaces political discourse

Campaign expenditures buy advertising. Given the vast sums politicians and business corporations spend on advertising, a legislature reasonably could conclude advertising, in turn, affects campaign results independent of the underlying merits of the candidates. To be sure, Americans are not vending machines, responding mechanically when a coin is inserted. More spending does not guarantee election any more than it guarantees successful product launches. But American ingenuity has long relied on advertising to create positive images that may have little to do with underlying reality, to influence news coverage and to use people's semi-conscious desires to manipulate their behavior. This is a fine way to sell products, but a legislature is entitled to conclude that citizens determining the future of their country should debate in a context free of excessive manipulation.[8]

When money buys advertising, and advertising replaces actual political debate, First Amendment values suffer. Democracy is endangered when the techniques of Madison Avenue replace those of reasoned or impassioned debate. Advertising can overwhelm intelligent debate if even non-purchased debate begins to look like a Madison Avenue production, or the media cover political elections as if they

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[8] The importance of money in politics is increasing at a startling rate. Between 2000 and 2004, total spending in Congressional races increased by one-third. Gary Kalman & Adam Lioz, U.S. PIRG Education Fund, *Raising the Limits 2006* (Feb. 2006) at p. 23.

were referenda on the quality of the advertisements rather than candidate positions.

Political discourse does not exist in a vacuum. Rather, it is a continuing dialogue among citizens attempting to find a way to live together—expressing their common values and compromising or tolerating their differences. The influence of wealth and advertising distorts this process and makes it less likely to achieve a result that all citizens can live with.

2. Money can buy the appearance of credibility and thereby credibility itself

Significantly, this artificial, purchased, multiplication and dissemination of advertising is likely to create an aura of credibility that the candidate and the candidate's ideas may not be able to achieve on their own.

Popularity breeds popularity for rationally explicable and sound reasons. People frequently rely on other's judgments as a preliminary filter of what merits attention and a check on or confirmation of their own judgments. Widely distributed ideas, popular artists and successful celebrities have been seen and judged worthwhile by many independent viewers, editors or consumers, making it more probable that they are worth our attention. If we agree with the general view, other people's positive judgments confirm that our own were not mere lapses, while if we disagree, ordinary humility suggests that if many people have come to the contrary conclusion, perhaps we need to reconsider.

Advertising can distort this rational process by allowing a candidate with access to wealth to mimic success in this filtering contest without actually having to succeed. Money can buy the appearance of the level of support that makes a candidacy serious. It can buy the repetition that can make a specious charge or an extreme argument seem

plausible and ordinary. With enough funds, a candidate can buy a "bandwagon" that less-involved voters will see as worth joining simply because it exists.[9]

3. Candidate expenditure does not reflect preexisting support

Buckley appears to have assumed that fundraising is a proxy for popularity, depth of commitment among supporters or soundness of ideas. Were this assumption correct, advertising would be less likely to be a distortion of the electoral system and therefore less troubling: rather than substituting wealth for talent or experience, it would simply amplify existing difference in support.

Unfortunately, the assumption that spending reflects support is deeply implausible. Given our highly unequal wealth distribution, a modest contribution from an American citizen in the middle of our wealth distribution may indicate a stronger level of support than a far larger contribution from a wealthy person. The median net worth for the roughly 42 million households in the bottom 40% of Americans is $5000 including home equity. Some 338,000 households, in contrast, had net worth exceeding $10 million.[10] Several candidates in recent years have had even greater individual wealth. With this degree of disparity, Jesus' teaching about the widow's mite is truer than ever: small contributions from ordinary people often may reflect more support than large

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[9] See, e.g., Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 11 (Daniel Kahneman et al. eds., 1982) (describing availability heuristic).

[10] Figures from Wolff (2004), supra n. 5, at table 2. Wolff's numbers are for 2001, using 1995 dollars. Wealth calculations are difficult and other methods generate somewhat different results. However, the details are not important; all observers agree that the American economy generates extraordinary wealth and distributes it extraordinarily unequally.

ones from the wealthy.[11] Reflecting this gap between support and ability to give, fewer than one-tenth of one percent of the voting age population gave $1000 or more to any congressional candidate in 2002. Yet funds from that tiny sliver of the public comprised the majority of all individual candidate contributions to those candidates.[12]

4. Business donors are purchasing services, not speaking

Many of the largest campaign contributions in our system are not statements of political positions at all. Rather, they are economically motivated investments—often from business corporations, their political action committees, or their employees—to advance the economic interests of their institutions. Investing in political decision-makers often is a highly effective way of increasing private profit: small changes in regulations, taxation or allocations can mean windfalls to particular companies or their competitors.

When donors are profit-maximizers or fiduciaries required by corporate law to set aside their political views of the good of the nation, contributions and related expenditures will flow in support of three types of politicians.

First, the rare, actively corrupt politicians who sell their influence. This Court has repeatedly recognized that the people have a compelling interest in barring this type of *quid pro quo* contribution. E.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). But *quid pro quo*

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[11] Mark 12:43-44, Luke 21:3-4. Modern economists refer to Jesus's insight as the "diminishing marginal utility of money": a dollar is worth far more to those who depend on it for basic necessities than for those who have more than they could ever spend.

[12] Adam Lioz, U.S. PIRG Education Fund, *The Role of Money in the 2002 Congressional Elections* (July 2003), p. 4.

contributions already are illegal and, presumably, most candidates have enough sense to avoid them.

The second option for profit-maximizing political investors is to fund politicians whose views generally favor the narrow economic interests of the donor. But most of the time, economic concerns of lobbyists are unlikely to be sufficiently salient to the general public (or candidates) to allow this type of maneuvering. The National Rifle Association or MoveOn.org can seek to fund candidates based on issues of concern to those groups, but most businesses cannot. Few candidates are likely to run on a platform openly favoring crony capitalism, pork barrel spending, corporate subsidies, or supporting an end to the environmental, securities, tort or civil rights laws that protect citizens' rights and direct the pursuit of private profit towards the public good. Moreover, some business managers are less likely to see their duty as promoting handouts to business *in general* than in finding the *particular* tax break, regulatory change or pork barrel project that will help the balance sheet of their particular firm. For that project, the candidate's general views are of little help.

This leaves a third, and quite disturbing, possibility. Businesses seeking to purchase political favors may fund candidates in the hope that implicitly—if not explicitly and illegally—the candidate will feel some obligation of reciprocity. Decent people, after all, typically return courtesies with courtesies and favors with favors without keeping exact track or using *quid pro quo* calculations. This is what is known in the industry as "buying access."

For a corporate executive, funding candidates who may be more sympathetic to the type of handouts or regulation that management believes will improve the firm's profits may well be good business, but it is not political participation that warrants First Amendment protection. The same is true of campaign contributions made to "buy access"

in order to allow a firm to lobby for legislative or regulatory details that will be invisible to the general debate.

The proper scope of regulation is a political issue that should be resolved by citizens and their representatives in response to political debate and voting power—not put up for auction to the highest bidder by politicians who view donors rather than voters as their key constituency. The businesses that are subjects of this debate ought not to control it—particularly when they, as in the case of our publicly traded corporations, are legally structured so as to bar them from considering the welfare of the system as a whole. Cronyism that is profitable for particular businesses in the short run may be destructive to our market system as a whole in the long run.

5. Expensive campaigns entrench incumbents, making them more able to raise the funds necessary to continue their entrenchment

Investor-donors interested in buying access or influence rationally will direct most of their money to incumbents, and especially to those incumbents able to influence economically important legislation. Incumbents have more to sell.

The more expensive campaigning becomes, the more important this incumbent fundraising advantage becomes. In a self-reinforcing system, the greater the incumbent's advantage, the more likely the incumbent is to be re-elected and, consequently, the greater the influence the incumbent has to sell.[13] In short, money attracts money and thus further

[13] In state races in the 2004 cycle, incumbents raised 58% of the total funds. Institute on Money in State Politics, *State Elections Overview 2004* (Dec 2005), p. 2, available at http://www.followthemoney.org/. The incumbents' advantage in Federal House and Senate raises was even more extreme: incumbents outspent challengers by 4.6 to 1 in 2004. Kalman & Lioz, *supra* n. 8, at p. 23.

distorts the system.

Buckley and its progeny have recognized the public's interest in eliminating both the actual purchase of political influence (corruption) and its appearance. But *Buckley*'s understanding of corruption is too limited. The First Amendment's guarantee of freedom of speech does not bar a state legislature from concluding that the detrimental effects of influence peddling extend well beyond *quid pro quo* corruption. Donors seeking to purchase political influence find legal ways of doing so; politicians seeking election or reelection fear the consequences of being outspent by a competitor; and as campaign expenditures spiral ever upward, politicians and donors alike find more creative ways to buy and sell access that should not be for sale.

First Amendment jurisprudence is based on the premise that unlimited speech promotes democratic government, by allowing criticism of incumbents and promoting discussion of alternative ideas. Unlimited campaign expenditures have the opposite effect: Incumbents are more able to raise large campaign chests because they are more likely to have the access and influence that most donors seek to purchase.

The need to attract wealthy donors reduces the ability of candidates to take positions in the public interest instead of their donors' and thus reduces the range and quality of candidate positions. Even when multiple viable candidates are able to raise the funds necessary to contend in our increasingly expensive campaigns, to raise the necessary funds they must share a fundamental commitment to appeasing donor interests. A state legislature is entitled to conclude that low voter turnout both reflects popular dissatisfaction with the status quo and is a problem that could be remedied by limiting the influence of wealth on campaigns.

Judge Winter's dissent below fails to recognize that, when selling access is the game, incumbents have an enormous advantage. The First Amendment's guarantee of free speech offers insufficient guidance to allow courts to displace legislative judgment as to the relative harm of "sale of access" or limits on buying name recognition through advertising. Nor would any free speech value be promoted by inventing a new constitutional right to purchase name recognition. When purchases, rather than speech, are the issue, *Buckley*'s metaphors of First Amendment abstention become *Lochner*'s unjustifiable enforcement of unfettered laissez-faire in the name of the Constitution.

CONCLUSION

Speech is not money. *Buckley* was wrong to impose a rigid First Amendment-based analysis on the complex problems of campaign finance reform. After thirty years, it is clear that *Buckley* followed the mistaken path of *Lochner*, imposing an artificial classification on the world without any basis in Constitutional text or values. For us to remain free, the "free market of ideas" must maintain its independence from the "economic market". The First Amendment, which applies to the states only by virtue of the Fourteenth Amendment's egalitarian commitment to equal protection and due process for all citizens, should not be distorted from a protector of democracy into the enforcer of a new plutocracy's grip on the political process.

This case involves less the First Amendment than the right of a state to attempt to further democracy and good government via economic regulation. Lochner's failure taught us that economic markets can be free if surrounded by politically-controversial legislation; campaign spending reform is precisely that kind of freedom-enhancing economic regulation. It should be analyzed under the fundamental Federalist principle that states create the rights of property

and their limits; under the Equal Protection principle that all citizens, whether rich or poor are entitled to have their vote given equal weight, and under the Republican Form of Government clause, *U.S. Constitution, Art. IV, § 4*, committing this nation to a government of the people, by the people and for the people—not of wealth, by wealth and for wealth.

In the absence of statutes like Vermont's Act 64, politicians must be inordinately concerned with the views of funders rather than voters. Moreover, successful fundraisers often avoid the spirit if not the letter of campaign finance regulations, leading to a general aura of sleaze. One consequence is that the *Buckley* framework gives independently wealthy politicians a double-edged advantage: they can outspend their opponents while maintaining the independence that used to mark statesmen when campaigns were cheaper. Unlimited campaign spending, far from preserving First Amendment values, corrupts our electoral process.

The Court should take this opportunity to disavow *Buckley* and uphold Vermont Act 64 under its ordinary voting rights jurisprudence.

Respectfully submitted,

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